

No. PD-1445-16

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/30/2017
ABEL ACOSTA, CLERK

FRED EARL INGERSON, III,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Hood County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Fred Earl Ingerson, III.
- * The trial Judge was the Honorable Ralph H. Walton, 355th Judicial District Court.
- * Trial counsel for Appellant were R. Shay Isham, Robert J. Glasgow, Jr., and Sam E. Taylor, II, 1401 W. Pearl Street, Granbury, Texas 76048.
- * Counsel for Appellant before the court of appeals were David L. Richards, 3001 West 5th Street, Suite 800, Fort Worth, Texas 76107 and Reagan Wynn, 3200 West 7th Street, Suite 420, Fort Worth, Texas 76107.
- * Trial counsel for the State were Robert T. Christian and Patrick D. Berry, 1200 W. Pearl Street, Granbury, Texas 76048.
- * Counsel for the State before the court of appeals was Megan Chalifoux, 1200 W. Pearl Street, Granbury, Texas 76048.
- * Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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Dictionary Website

According to UrbanDictionary.com, “jigaboo” is a derogatory term used in c o n j u n c t i o n w i t h A f r i c a n - A m e r i c a n s , http://www.urbandictionary.com/define.php?term=jigaboo , <i>last visited May 22, 2017</i>	9 n.41
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v.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

To the Honorable Court of Criminal Appeals:

In reversing Appellant's capital murder conviction, the court of appeals created an alternate universe in which a hypothetical jury presented with the same evidence weighed it in Appellant's favor and entered an acquittal. This is an unauthorized exercise of appellate review, violative of basic sufficiency principles that were

specifically created to prevent usurpation of the jury's own assessment. Here, all rational inferences supporting the jury's findings were grievously discarded as a result of the court's application of the illegitimate divide-and-conquer and alternative reasonable hypotheses analytical frameworks.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, and the Court did not grant argument.

STATEMENT OF THE CASE

Appellant was convicted of capital murder and sentenced to life imprisonment. A two-judge panel of the court of appeals reversed, holding that the evidence was insufficient to establish that Appellant shot and killed Robyn Richter and Shawna Ferris. *Ingerson v. State*, 508 S.W.3d 703 (Tex. App.—Fort Worth 2016) (Dauphinot and Meier, JJ.). Justice Walker, joined by Livingston, C.J., and Gabriel, J., requested *en banc* consideration, which was denied by one vote. *Ingerson v. State*, No. 02-11-00311-CR (Walker, J., Livingston, C.J., and Gabriel, J.).¹ The State's motion for *en banc* consideration was also denied.

¹<http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=538cd6ce-4906-4bb3-a897-1ff30149b24c&coa=coa02&DT=Opinion&MediaID=639910f9-1b0e-4d06-ac62-1d79c4e1fe90>.

ISSUE PRESENTED

In a capital case, did the two-justice panel fail to defer to the verdict, apply defunct sufficiency standards, and ignore inculpatory evidence when Appellant was the last person with the victims, had been rejected by them, fled the scene, had a .38—the likely weapon—had a .38 under his car seat the day after, had gun-shot residue on his pants and car seat, and acted suspiciously?

SUMMARY OF THE ARGUMENT

Robyn Richter and her friend Shawna Ferris were found dead by gunshot in Richter's SUV in a restaurant parking lot.

Appellant's and Richter's strained relationship and interaction before the murders, combined with the strong circumstantial and physical evidence, establishes Appellant's guilt. Richter had no romantic interest in Appellant but led him on for his money for two months by continuing to date him. He had become suspicious of her motives after experiencing mixed messages from her. On the night of the murders, Appellant met Richter and Ferris at the Japanese restaurant Miyako. Richter flaunted her affections for a black African man she was dating while the three had drinks at the bar. In response, Appellant vocalized his disdain and made racist remarks. He became even more irritated when Richter flirted with a stranger at the bar and grabbed his genitalia.

Appellant was the last person seen with Richter and Ferris. He had been standing beside Richter's SUV talking to Richter and Ferris in Miyako's parking lot

when the restaurant's staff and other patrons drove away. Nearby surveillance videos showed Appellant's SUV frantically fleeing the area soon after midnight. Based on Richter's cell-phone records, this was shortly after Richer and Ferris were shot.

Richter's and Ferris' bodies were discovered the next morning inside the SUV right where they were last seen alive—with Appellant.

Though the murder weapon was never recovered, Appellant owned the type of gun and projectiles used to kill Richter and Ferris. A gun matching that description was seen under the driver's seat of Appellant's SUV the day after the murders. And Appellant's pants from that night tested positive for gun-shot residue.

Finally, despite knowing the serious nature of the investigation and his status as a suspect, Appellant behaved suspiciously throughout the investigation and gave police odd and conflicting statements on multiple occasions.

STATEMENT OF FACTS

1. Richter's and Appellant's Relationship

In the nearly two months that Richter and Appellant dated, the two exchanged 264 calls and text messages, almost daily, totaling twenty-four hours and seventeen minutes.² A little over fifteen hours (62%) were initiated by Appellant.³

² 4 RR 274-75; 7 RR 17; State's Exhibit 189.

³ 7 RR 18.

Appellant and Richter often dined together, and Appellant spent time with Richter's daughter.⁴ Appellant noted that Richter would joke around, referring to him as her husband.⁵ He would treat her to pedicures, and he visited the county tax office where she worked (and the two first met).⁶ Richter wanted to introduce Ferris to Appellant, so they went to his house a few weeks before the murders, and he took them out to dinner.⁷

A few days before the murders, Appellant and Richter dined out.⁸ Richter asked Appellant for a \$1,500 loan, but Appellant refused.⁹ He thought she wanted the money to help foster S.L., Richter's "niece" through her ex-husband, whom she was actually trying to adopt.¹⁰ Richter told her coworker/friend that Appellant lent her \$10,000 so she could appear financially stable enough to adopt; normally, Richter

⁴ 4 RR 274-75, 285; 5 RR 182.

⁵ State's Exhibits 153/154 at 16:26.

⁶ 4 RR 274-75, 277; 5 RR 175; State's Exhibit 165 (6-28-08 interview), at 18:49.

⁷ 5 RR 148-49; State's Exhibit 165 at 18:50.

⁸ State's Exhibit 165 at 9:10-11, 19:52.

⁹ State's Exhibit 165 at 9:11.

¹⁰ 5 RR 167; State's Exhibits 153/154 at 16:27, 17:19.

had just under \$200 in her account after satisfying her monthly obligations.¹¹

Appellant believed that Richter was not forthcoming about her relationship with her children.¹² Nor could he grasp her financial situation; one day she would be broke and, the next, have a “wad of cash.”¹³ Richter told Appellant she had a “sugar daddy” who gave her cash and paid her bills.¹⁴ Appellant told police that such an arrangement was “not happening” with him.¹⁵

Richter’s coworker/friend testified that when Appellant came into the tax office on the day of the murders, Richter joked with him about writing a check from his checkbook.¹⁶ After he left, she made fun of him in front of her coworkers.¹⁷ Though Richter’s coworker/friend did not believe Appellant knew he was being led on, Appellant indicated otherwise to police.¹⁸ He felt like a mark and explained he

¹¹ 5 RR 102; 6 RR 208.

¹² 5 RR 167; State’s Exhibits 153/154 at 16:27, 17:19.

¹³ State’s Exhibit 165 at 19:11; State’s Exhibits 153/154 at 16:54-55.

¹⁴ State’s Exhibit 165 at 19:11; State’s Exhibits 153/154 at 16:54-55.

¹⁵ State’s Exhibit 165 at 19:11; State’s Exhibits 153/154 at 17:29.

¹⁶ 4 RR 276, 279; State’s Exhibit 165 at 19:10.

¹⁷ 4 RR 279-80.

¹⁸ 4 RR 286.

decided not to be romantically involved with her because of her dubious intentions.¹⁹ When asked if Richter was “using” him, Appellant said he did not let her.²⁰ He said she paid for her own meals at restaurants.²¹ Appellant admitted Richter treated him “like a dog” and embarrassed, talked down to, and “belittled” him.²² But he excused her conduct, stating she was joking or drunk when it happened.²³

Contrary to Appellant’s characterization of his “friendship” with Richter, S.L. testified about Richter’s rejection of Appellant as a romantic partner.²⁴ Richter told her Appellant was trying to have “sex” with her, but he disgusted her.²⁵ Richter, who believed Appellant was falling in love, said she was going to be “nice” to him to see if he would lend her \$10,000 or \$15,000 so she would appear financially stable enough during S.L.’s adoption process.²⁶

¹⁹ State’s Exhibits 153/154 at 16:41, 17:19.

²⁰ State’s Exhibits 153/154 at 17:15.

²¹ State’s Exhibits 153/154 at 19:29.

²² State’s Exhibits 153/154 at 17:19-22.

²³ State’s Exhibits 153/154 at 17:21-22.

²⁴ 5 RR 167.

²⁵ 5 RR 167.

²⁶ 5 RR 166; 6 RR 206; State’s Exhibits 153/154 at 17:29.

Appellant was also aware that Richter was dating a man named Mohammad (“Mo”) Sylla, who was African.²⁷ She talked about him constantly, saying he was her “best friend” and she would do “anything” for him.²⁸ Appellant told police, “She was all about this guy.”²⁹

2. The Night of the Murders

A few hours before Richter and Ferris arrived at Miyako’s, Richter texted Appellant a photo of her breasts.³⁰ Appellant texted, saying, “Are you bored, horny or teasing?”³¹ Before Appellant arrived, a bartender overheard the women talk about shopping with Appellant’s money.³² After he arrived, one Miyako employee overheard some of the conversation between the three.³³ He remembered hearing something about “relationships” and Appellant say, “Fucking niggers” several

²⁷ State’s Exhibit 165 at 18:51, 19:13.

²⁸ State’s Exhibit 165 at 18:51-52, 18:55.

²⁹ State’s Exhibit 165 at 18:55.

³⁰ 5 RR 237-39; 6 RR 22, 78; State’s Exhibit 165 at 18:48, 18:51; State’s Exhibits 153/154 at 15:21, 16:01.

³¹ 5 RR 237; State’s Exhibits 153/154 at 16:02.

³² 6 RR 82-83, 85, 94.

³³ 6 RR 43-45, 60.

times.³⁴ While Richter was in the bathroom, an employee heard Ferris tell Appellant, “No, that would not be alright with me, because she’s like a sister to me.”³⁵ Richter flirted with one of the patrons, calling him “sweetie,” and she grabbed his “nuts.”³⁶ That patron announced it, and Appellant chastised Richter.³⁷ Appellant told police that the “girls were pretty wild” and were drinking “pretty good.”³⁸ Appellant had at least six drinks.³⁹ He knew Richter texted with Sylla and thought she planned to meet Sylla but did not know when or where.⁴⁰

Having left the bar for about a half hour, Richter and Ferris returned and were sitting in Richter’s SUV listening to “jigaboo”⁴¹ music—as Appellant called it—

³⁴ 6 RR 43-45, 60.

³⁵ 6 RR 69.

³⁶ 6 RR 85-86, 102-03; State’s Exhibit 165 at 18:52, 19:08-09, 19:16; State’s Exhibits 153/154 at 15:49.

³⁷ 6 RR 85-86, 102-03; State’s Exhibit 165 at 18:52.

³⁸ State’s Exhibit 165 at 18:52, 19:01.

³⁹ State’s Exhibit 165 at 19:01.

⁴⁰ State’s Exhibit 165 at 18:56-58, 19:06.

⁴¹ According to UrbanDictionary.com, “jigaboo” is a derogatory term used in conjunction with African-Americans.
<http://www.urbandictionary.com/define.php?term=jigaboo>, *last visited May 22, 2017*.

when he and others walked out around 11:45.⁴² Appellant talked to the women through the open front windows (on both sides) as they sat in the SUV.⁴³ Appellant was still talking to them when everyone else left.⁴⁴

Richter's last outgoing call ended at 11:53.⁴⁵ Several incoming calls and texts, the first of which came in at 12:22 a.m., went unanswered.⁴⁶

A few minutes after midnight, Little Miracles surveillance videos recorded Appellant drive down a street near his house, abruptly slam on the brakes, just past a side street, and then reverse and turn down a side-street.⁴⁷

3. Appellant's Actions Immediately After the Murders

At 12:16 a.m., Appellant called Lynn Harper, another woman he was dating.⁴⁸ They had talked earlier but had not planned for Appellant to visit Harper in Arlington

⁴² State's Exhibit 165 at 18:58-59, 19:08. 6 RR 46-47.

⁴³ 6 RR 47, 86, 120; State's Exhibit 165 at 18:59; State's Exhibits 153/154 at 15:42-45.

⁴⁴ State's Exhibits 153/154 at 16:21-22.

⁴⁵ 5 RR 251-52; 7 RR 28.

⁴⁶ 5 RR 252; 7 RR 36-37.

⁴⁷ State's Exhibit 1 (Camera 7) at 00:2:42-45; 4 RR 62, 67-69.

⁴⁸ 7 RR 45-48, 61, 88, 90; 8 RR 92; State's Exhibits 153/154 at 15:39-41.

that night.⁴⁹ Harper said Appellant had never called her that late requesting to come over.⁵⁰ Appellant told police he went home, packed clothes, and got to Harper's around 1:30.⁵¹

4. The Day After the Murders

Richter's and Ferris' bodies were discovered in Miyako's parking lot the next morning.⁵² Each sustained a single shot to the head.⁵³ The SUV's front windows were still down, and it was parked in the same spot as the night before.⁵⁴ Richter's cell phone and both women's purses were in the SUV, which caused investigators to rule out robbery as a motive.⁵⁵

Meanwhile, that morning, Appellant told Harper he was going to a car show at LaGrave Field.⁵⁶ Appellant's cell phone had no activity at LaGrave Field.⁵⁷ Instead,

⁴⁹ 8 RR 91-93.

⁵⁰ 7 RR 94.

⁵¹ 7 RR 93; State's Exhibits 153/154 at 15:52, 16:27.

⁵² 4 RR 10-12.

⁵³ 4 RR 12.

⁵⁴ State's Exhibits 2, 4.

⁵⁵ 4 RR 21-22.

⁵⁶ 7 RR 95.

⁵⁷ 7 RR 50; 8 RR 168-69.

he ran errands that morning. At 11:30 a.m., Appellant went to the Granbury Kwik Kar for service.⁵⁸ Appellant chatted with the cashier; the conversation became a “little strange” when he told her he just broke up with a woman because of her drinking.⁵⁹ The tech who vacuumed the interior of his car remembered seeing a revolver under the driver’s seat.⁶⁰ He believed the gun was stamped with an “S” and “W,” the insignia for Smith and Wesson.⁶¹ Appellant took the pants he wore the night before to the dry cleaners.⁶²

Appellant returned to Harper’s that afternoon.⁶³ In the early afternoon, when Appellant’s family called to tell him about the murders and that police wanted to talk to him, he made no effort to return to Granbury where the murders occurred or contact police.⁶⁴ Around 6:00 p.m., a Texas Ranger called;⁶⁵ Appellant called back

⁵⁸ 6 RR 252, 255; 7 RR 51.

⁵⁹ 6 RR 261-62.

⁶⁰ 8 RR 16, 19, 35.

⁶¹ 8 RR 39-41.

⁶² 4 RR 47-48; 7 RR 188; State’s Exhibits 153/154 at 16:15-18.

⁶³ 7 RR 96.

⁶⁴ 7 RR 53; 8 RR 171.

⁶⁵ 8 RR 96-98.

at 6:06.⁶⁶ Though Appellant told the Ranger he was at a mall and about to see a movie, he was at Harper's house.⁶⁷

5. Appellant's Recorded Interviews with Police

Appellant was interviewed by police that night at 9:00 p.m. and again the next day.⁶⁸ When asked if anything "bad happened" on the 27th, he stated, "Not to me."⁶⁹

During the second interview, Appellant had difficulty establishing his time-line with respect to when he returned to Granbury from Harper's on June 28th.⁷⁰ He first stated it was not until his police interview.⁷¹ However, after remembering his dry cleaning, it took some more prodding before he recalled going to LaGrave Field.⁷²

Appellant admitted he was involved with several women who wanted money from him, including his ex-wife.⁷³ Appellant indicated he carried a lot of animosity

⁶⁶ 7 RR 54; 8 RR 136-37.

⁶⁷ 7 RR 55-56; 8 RR 98, 136-40.

⁶⁸ State's Exhibits 153/154; State's Exhibit 165.

⁶⁹ State's Exhibits 153/154 at 16:24.

⁷⁰ State's Exhibits 153/154 at 16:22-25.

⁷¹ State's Exhibits 153/154 at 16:22.

⁷² State's Exhibits 153/154 at 16:22-26.

⁷³ State's Exhibits 153/154 at 16:00 (impregnated a woman named Melissa), 17:18, 17:24 (he's been getting "ripped" by his ex-wife).

because he was paying out more than he earns, living with his dad, and also dealing with a woman who claimed he impregnated her.⁷⁴

Appellant stated the last time he shot a gun was a year ago.⁷⁵

6. Forensic Evidence

The murder weapon was never found.⁷⁶ A recovered bullet indicated that the gun was likely a .357 or Colt revolver that used a .38 round.⁷⁷ Appellant had purchased a .38 Colt revolver in Indiana while living there with his ex-wife.⁷⁸ After their divorce, Appellant retrieved it, along with 130-grain bullets.⁷⁹ A projectile recovered from the scene was 130 grain.⁸⁰ Appellant told police he sold the gun to a “Mexican” on South Padre Island.⁸¹

Testing on the pants Appellant wore on the 27th, which police collected from

⁷⁴ State’s Exhibits 153/154 at 17:25-26.

⁷⁵ State’s Exhibits 153/154 at 15:47.

⁷⁶ 8 RR 206.

⁷⁷ 5 RR 25, 59, 67, 73; 8 RR 186.

⁷⁸ 4 RR 159-62, 174, 184, 188-89, 191-93, 237-38, 249.

⁷⁹ 4 RR 239-42; 8 RR 175-76, 202.

⁸⁰ 8 RR 176.

⁸¹ 8 RR 204-05.

the cleaners, revealed the presence of gun-shot residue on the waistband. The results showed one “characteristic” particle, which includes lead, barium, and antimony.⁸² The other three results were “indicative,” which meant they contained two of the three particles.⁸³ The driver’s seat of Appellant’s vehicle showed one “indicative” particle.⁸⁴

ARGUMENT

Under *Jackson v. Virginia*, the evidence is considered in the light most favorable to the jury’s verdict. 443 U.S. 307, 318-19 (1979). Therefore, a reviewing “court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Jackson*, 443 U.S. at 326. An appellate court “is restricted to guarding against the rare occurrence when a factfinder does not act rationally.” *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). A divide-and-conquer approach is prohibited, *Hooper v. State*, 214 S.W.3d 9, 12 (Tex. Crim. App. 2007), as is an

⁸² 7 RR 239-40, 243.

⁸³ 7 RR 240, 243, 245.

⁸⁴ 7 RR 243, 246, 253.

alternative-reasonable-hypothesis analysis. *Taylor v. State*, 10 S.W.2d 673, 680 (Tex. Crim. App. 2000).

1. Strained Relationship and Interaction Before the Murders

Failing to follow sufficiency review principles, the court of appeals erroneously concluded that:

- There was no evidence Appellant knew Richter was using him or that their relationship was anything but friendly and non-adversarial.⁸⁵
- It was Appellant’s decision to be “friends.”⁸⁶
- There was no evidence Appellant was angered by Richter grabbing the patron’s “nuts,” or affected by her poor treatment.⁸⁷
- No one said Appellant appeared angry with Richter when talking to the women beside the SUV.⁸⁸
- Richter wanted money, but there was no evidence Appellant gave her \$10,000.

Appellant’s and Richter’s relationship and interaction, which soured over the course of the two months leading up to the murders supports, the verdict. Between May 8th and June 27th, the two had some sort of phone contact every day except four

⁸⁵ *Ingerson*, 508 S.W.3d at 732.

⁸⁶ *Id.* at 732-33.

⁸⁷ *Id.* at 732.

⁸⁸ *Id.* at 733.

days.⁸⁹ Although he denied it when directly asked, the evidence showed Richter used him for money.⁸⁹ And she was unkind to him; Appellant told police she treated him like “a dog” and embarrassed him.⁹⁰ When Richter asked Appellant for \$1,500, knowing she was using him, he rejected her request.⁹¹ However, Richter told her coworker/friend that Appellant lent her \$10,000.⁹² Richter also rejected Appellant’s sexual advances and “love”; “friendship” was not Appellant’s choice. On the night of the murders, Appellant chastised Richter for her grabbing the patron’s “nuts”⁹³ and criticized her behavior as “wild” and drunk.⁹⁴ Finally, Appellant knew Richter was head-over-heels for Sylla and made a spectacle of himself, yelling, “Fucking niggers” several times.⁹⁵

⁸⁹ State’s Exhibit 189 (MetroPCS/Richter).

⁸⁹ State’s Exhibits 153/154 at 16:41, 17:15-19.

⁹⁰ State’s Exhibits 153/154 at 16:41, 17:15-19.

⁹¹ State’s Exhibits 153/154 at 16:41, 17:15-19.

⁹² 5 RR 166; 6 RR 206; State’s Exhibits 153/154 at 17:29

⁹³ 6 RR 261-62.

⁹⁴ State’s Exhibit 165 at 18:52, 19:01.

⁹⁵ 6 RR 43-45, 60.

2. Appellant was the Last Person Seen with the Victims⁹⁶

Of the fact Appellant being the last person seen with Richter and Ferris, the appeals court discounted its importance, dismissing it with a single reason: Mere presence at the scene of a crime is insufficient to sustain guilt as a party.⁹⁷

The evidence here establishes much more than Appellant's "mere presence." The time-line in relation to Appellant's presence is telling. The logical window for the shootings was between 11:53, the end of her last call, and 12:23, the unanswered call. During that time, Appellant spoke with them, killed them, and fled the scene.⁹⁷ Shortly after midnight, though he was in his neighborhood, Appellant passed his turn and slammed on the brakes. His panic, disorientation, and flight are indicative of guilt.⁹⁸ *See Clayton v. State*, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007).

Finding that it was Appellant's SUV captured on the Little Miracles'

⁹⁶ As the trier of fact, the jury was authorized to rule out other suspects based on their firm alibis. 4 RR 33-39, 72, 86-87; 5 RR 44, 132-34; 6 RR 161-63; 7 RR 91-93, 98-99, 145-47; 8 RR 143-44, 177.

⁹⁷ *Ingerson*, 508 S.W.3d at 733.

⁹⁷ State's Exhibit 1, Camera 7 at 00:2:42-45; 4 RR 62, 67-69.

⁹⁸ 4 RR 67; State's Exhibit 1, Camera 7 at 00:2:42-45; 4 RR 62, 67-69.

surveillance videos is not “speculative,” as Appellant has maintained.⁹⁹ In fact, at trial he conceded that it was him and tried to use it to his advantage, arguing that he was “long gone” from the scene and, “it’s a miracle . . . that the Little Miracles’ surveillance video camera did catch him, because it proves that he’s innocent.”¹⁰⁰ But, even if the issue were contested, the time in which the women were killed coincides with Appellant’s account of leaving Miyako’s and self-described route home.¹⁰¹ He told police he took Autumn Ridge to Meadows Drive to Paluxy Road (Highway 51) and turned right onto Crites and then made a left onto Spring Street—where his home was located.¹⁰² The videos show a small SUV like

⁹⁹ See Appellant’s Response to State’s PDR, at 6-7.

¹⁰⁰ 3 RR 195, 196 (opening: “you can be the judge about whether or not he screeches to a halt or whether or not he’s at a high rate of speed, I think it’s going to be undisputed that he had six Maker’s Marks at the bar, at Miyako’s that night, and probably that’s bad judgment, but he’s not on trial for DWI. But the great thing about the Little Miracles is we know precisely at 12:02 and 30 second that Fred and his Mazda Tribute were long gone from the Miyako parking lot.”); 10 RR 67 (closing: “[W]e find out about the Little Miracles video, and we see what time [Appellant] left that night,” noting “seven-minute window of opportunity” based on videos).

¹⁰¹ 4 RR 57-61 (explaining that the recorded video times and Richter’s cell phone record documenting her call history were in accord).

¹⁰² 4 RR 62, 64-65; State’s Exhibit 166.

Appellant's Mazda Tribute driving on Paluxy and passing Crites.¹⁰³ The SUV is then seen abruptly stopping, reversing until the intersection of Paluxy and Crites,¹⁰⁴ turning right onto Crites, and then turning left onto Spring.¹⁰⁵ Detective Gizzard, based on this information, identified the vehicle as Appellant's.¹⁰⁶

Finally, Richter's SUV was parked in the same place it had been when Appellant was last seen there, and the front windows were still down.¹⁰⁷ These details are important in proving Appellant's guilt because they were unchanged between Appellant's presence and the discovery of the bodies. The court of appeals' rejection implicitly presumed that Appellant left and the real killer appeared and shot them.

3. Appellant Owned the Type of Gun and Ammunition Used to Kill

The court of appeals discounted important evidence and developed alternative reasonable hypotheses to explain away inculpatory evidence. It held there was no

¹⁰³ State's Exhibit 1, Camera 7 at 00:2:42-45; 4 RR 67-69.

¹⁰⁴ State's Exhibit 1, Camera 5 at 00:2:44-53; 4 RR 67-69. Little Miracles was located on the corner of Paluxy and Crites. 3 RR 213.

¹⁰⁵ State's Exhibit 1, Camera 5 at 00:2:42-45.

¹⁰⁶ 4 RR 69; 5 RR 160-61.

¹⁰⁷ State's Exhibits 1, 4; State's Exhibit 198 at 1:02.

evidence Appellant had access to a .38 or .357.¹⁰⁸ Similarly, it found there was no evidence of Appellant’s recent possession of the gun sold to the “Mexican.”¹⁰⁹ The .38 from Indiana, the court stated, was one of three types of guns that could have been used.¹¹⁰ And there was no evidence that Appellant had access to a .357 or .38 Super Auto—the other two types that could have been used.¹¹¹ The court determined the Kwik Kar tech’s testimony—the sole evidence that Appellant had a gun under his seat—falls short of the requisite proof.¹¹² Instead, the court reasoned, because a .44 Smith and Wesson was found at Appellant’s house, that must have been the gun first identified by the tech.¹¹³ Finally, it held that the State disproved its own theory because the projectiles recovered from the .38’s previous owner in Indiana did not match the projectile here.¹¹⁴

¹⁰⁸ *Ingerson*, 508 S.W.3d at 732-33. A .357 can fire .357 or .38 rounds, and a .38 can only fire .38 rounds. 4 RR 52; 5 RR 16-17.

¹⁰⁹ *Id.*

¹¹⁰ *Ingerson*, 508 S.W.3d at 734.

¹¹¹ *Id.*

¹¹² *Id.* at 735.

¹¹³ *Id.* at 734.

¹¹⁴ *Id.* at 733-34; 4 RR 179 (original owner’s testimony).

The court failed to acknowledge crucial evidence supporting the verdict:

- Appellant bought a .38 and retrieved it from his ex-wife, along with 130-grain bullets.¹¹⁵ A .38's most common bullet weights are 145 and 158.¹¹⁶ So the use of 130 grain bullets is somewhat of an anomaly.
- The absence of evidence of a .357 or .38 Super Auto does not preclude reliance on affirmative evidence of the .38. *Cf. State v. Kerwick*, 939 S.W.3d 270, 274 (Tex. Crim. App. 2013) (court incorrectly focused on what it believed the record and findings should have contained).
- Appellant could not identify who he sold the .38 to in 2008, even though he could identify the buyers of this other guns.¹¹⁷ Police tracked down every gun Appellant sold except the .38.¹¹⁸
- It was reasonable to infer that Appellant carried a gun in his vehicle. He showed a friend a .38 in his console in 2006.¹¹⁹ In 2007, Appellant showed a woman a revolver stored in a rear compartment.¹²⁰
- The Kwik Kar tech saw a revolver under the front seat of Appellant's car the day

¹¹⁵ 5 RR 51.

¹¹⁶ 5 RR 52.

¹¹⁷ 9 RR 44.

¹¹⁸ 8 RR 205, 207.

¹¹⁹ 8 RR 76-78.

¹²⁰ 8 RR 51-55.

after the murders.¹²¹ Its presence was corroborated by “indicative” residue.¹²² Upon viewing guns at Cabela’s in 2009, the tech identified the gun as being a .38 Colt, even though he initially believed he saw a “S & W” on it.

- That the projectiles fired by the prior owner did not match the one here does not eliminate the .38 as the murder weapon; the prior owner testified he shot many guns in the dirt pile and, with that gun, he would have used wadcutters—cheap ammo that did not have a jacket.¹²³ The brand may affect how a bullet is marked when discharged, and a barrel may be altered by use or unintentional acts.¹²⁴

The jury was entitled to resolve any conflicts in the evidence against Appellant, and those findings are entitled to deference.

4. Gun-Shot Residue on Appellant and Car Seat

As with the gun evidence, the court failed to accurately consider the evidence of the gun-shot residue.¹²⁵ Offering an alternative explanation, the court said the .44 Smith and Wesson was logically the source of the residue under the car seat.¹²⁶ And,

¹²¹ 8 RR 16, 19, 35.

¹²² 7 RR 243, 246, 253.

¹²³ 4 RR 181.

¹²⁴ 5 RR 35, 46-47.

¹²⁵ The court of appeals did not discount the existence of the residue or any potential transfer from the dry cleaner’s. The State’s expert did not rule out transfer but said it was “possible.” 7 RR 261.

¹²⁶ 5 RR 35, 46-47.

thus, it can be attributable to the .44 having been under the seat.¹²⁷ It further noted that it could not be directly linked to the murder.¹²⁸ Finally, it emphasized the lack of the victim's DNA on Appellant's pants despite "splash DNA" at the scene.¹²⁹

The forensic evidence is inculpatory. It is tenuous to credit another source to explain the residue because Appellant had not shot a gun for a year.¹³⁰ Transfer from other clothing at the cleaners is speculative and unlikely. Also, the jury could have concluded that the tech identified a gun like the Colt .38; and, that particular gun was never recovered.¹³¹ The seat residue likely came from Appellant storing the Colt .38. Moreover, it is unlikely that the seat residue would have been transferred to Appellant's waist band. The lack of blood on Appellant's pants is not exculpatory because jurors could rationally conclude that Appellant's torso and legs would have been protected from "splash DNA" by the SUV's door.

¹²⁷ *Ingerson*, 508 S.W.3d at 735.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ State's Exhibits 153/154 at 15:47.

¹³¹ 8 RR 27-33, 191-94, 205.

5. Appellant's Incriminating Suspicious Behavior

When the court of appeals was not ignoring Appellant's suspicious behavior, it inappropriately dismissed it. The court's perfunctory resolution stated: (1) his confusion about the time he left Miyako's is "short of being incrementally suspicious"¹³² and, (2) Appellant was voluntarily interviewed by police three times and maintained his innocence.¹³³

There are numerous instances of suspicious behavior, in addition to the evidence set out above, that supports the jury's verdict.

- Richter and Appellant dated; he wanted to have sex but denied any romantic interest to police.¹³⁴
- Except for four days, during almost two months, the two had some type of phone contact; he initiated contact substantially more.¹³⁵ Appellant did not call or text Richter after the day she was murdered.¹³⁶
- When told of the video of his vehicle fleeing, Appellant vacillated between

¹³² *Ingerson*, 508 S.W.3d at 735.

¹³³ *Id.*

¹³⁴ 8 RR 66; 7 RR 18.

¹³⁵ 7 RR 18.

¹³⁶ State's Exhibit 189 (May 8 and June 27; no phone contact May 21, June 11, 17, and 18).

admitting that “could have happened” and denying it.¹³⁷

- Appellant told police he did not remember bringing the .38 to Texas after telling them he sold it; he said his ex-wife refused to give it to him and did not have it anymore.¹³⁸ He finally admitted selling it again after talking with counsel.¹³⁹
- Harper was surprised when Appellant called her around 12:15 a.m. and asked to come over; they did not have plans to meet that night, and he had never made such a request that late before.¹⁴⁰
- At Kwik Kar, Appellant strangely mentioned breaking up with a woman the night before because of her drinking.¹⁴¹
- In the early afternoon, Appellant ignored the police’s request to talk to him; all others had been interviewed.¹⁴²
- The evening after the murders, Appellant lied to police, stating he was at a mall to see a movie; he was at Harper’s.¹⁴³
- The day after Appellant said he went to LaGrave Field, he inexplicably forgot about it; he had no cell phone activity at LaGrave Field.¹⁴⁴

¹³⁷ State’s Exhibit 198 at 23:03-24:09.

¹³⁸ 8 RR 202-03; State’s Exhibit 198 at 27:50-34:30.

¹³⁹ State’s Exhibit 198 at 45:50-48:00.

¹⁴⁰ 8 RR 91-94.

¹⁴¹ 6 RR 248, 258-62.

¹⁴² 6 RR 221-24; 8 RR 135-36, 171.

¹⁴³ 8 RR 97.

¹⁴⁴ 7 RR 95; State’s Exhibits 153/154 at 16:22-26.

- Appellant had little emotion about the murders and told police nothing “bad had happened.”
- Three of the four shirts he gave to police as what he might have been wearing had already been washed and none matched the description of witnesses.¹⁴⁵
- Appellant acted like Richter’s murder was “no big deal” to a friend.¹⁴⁶
- After the murders, Appellant made an “off the cuff” reference about it to a friend; Appellant later hung his head and said, “I won’t be seeing her anymore” to the same friend.¹⁴⁷
- Appellant never mentioned to his friends that he was being investigated.¹⁴⁸

6. **Conclusion: Sufficient Evidence to prove Appellant was the Murderer**

A deferential picture of the events surrounding the murders proves Appellant killed them and also explains why. *See Clayton*, 235 S.W.3d at 781 (motive is a circumstance indicative of guilt). Appellant had been dating three women, and he sold himself by offering stability to those who struggled financially.¹⁴⁹ But, in reality, he lived with his dad, was paying child support, and believed he may soon be

¹⁴⁵ 4 RR 47; 6 RR 30; 9 RR 65.

¹⁴⁶ 8 RR 68.

¹⁴⁷ 8 RR 75-76.

¹⁴⁸ 8 RR 62-68, 74-76.

¹⁴⁹ 5 RR 166; 8 RR 51 (told Melissa Russell he would take care of her financially).

supporting a baby from a fling.

Richter rejected Appellant as a lover and was overtly cruel to him by treating him poorly, leading him on, and using him for money while, at the same time, flaunting her strong feelings for Sylla—a “nigger” in Appellant’s bigoted mind. The night of the murders was no different. Richter toyed with his emotions before he even got to Miyako’s when she texted him a photo of her breasts. Appellant was intrigued, responding, “bored, horny or teasing?”¹⁵⁰ Nevertheless, he was slighted again when he arrived at Miyako’s. Their interaction was tense, and Appellant was disgusted with her drinking and grabbing a patron’s “nuts.” Richter’s rejection was followed by Ferris’; Ferris refused his overtures when she said her loyalties lay with Richter.¹⁵¹ After everyone left and Appellant was talking with Richter and Ferris outside, something happened that caused Appellant, whose judgment was compromised by alcohol, to finally lose control—to prove he was the one with power and would no longer be used. Or he had been plotting and remained cool until any witnesses left. Either way, he murdered Richter and Ferris. Appellant’s decision to seek out Harper’s affection afterwards is not so remarkable. She was the one woman

¹⁵⁰ 5 RR 237; State’s Exhibits 153/154 at 16:02.

¹⁵¹ State’s Exhibit 198 at 4:50-5:26.

who had not rejected him. Indeed, she was still dating him while he was on trial.¹⁵² This account, considered in light of the facts supporting the jury's resolution of the evidence, proves that the court of appeals' reversal is erroneous.

PRAYER FOR RELIEF

The court of appeals' decision should be reversed, and the trial court's judgment should be reinstated.

¹⁵² 8 RR 88.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 5,409, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on
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